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IN THE

Supreme Court of the United States

October Term, 1978

No. 77-6949

ROBERT DUNN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the United States Tenth Circuit Court of Appeals is reported officially at 577 F.2d 199. A copy of the opinion appears in the Appendix. (A. 70).

JURISDICTION

The judgment of the Court of Appeals affirming the conviction was entered June 5, 1978. (A. 70). A

timely Petition for Rehearing was denied on June 22, 1978. (A. 81). The Petition for Writ of Certiorari was filed on June 20, 1978. On June 28, 1978, the Court of Appeals granted a Motion to Stay Mandate pending final disposition by this Court. Certiorari was granted December 11, 1978. (A. 82).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V—Capital Crimes: Double Jeopardy: Self-Incrimination: Due Process: Just Compensation For Property

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

84 Stat. 927; Title 18, United States Code, § 6002. Immunity generally

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

84 Stat. 932; Title 18, United States Code, § 1623. False declarations before grand jury or court

> (a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of Title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time

the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

QUESTIONS PRESENTED

1. Whether an inconsistent declarations conviction can be sustained when one of the two declarations charged was not made in an "ancillary proceeding" within the meaning of the statute.

2. Whether the appellate court improperly amended the indictment by considering declarations not pled and by adopting a theory not presented at trial.

3. Whether immunized grand jury testimony can be used to establish the *corpus delicti* in an inconsistent declarations prosecution.

STATEMENT OF THE CASE

Dunn was indicted on five counts of false declarations before a U. S. court or grand jury in violation of 18 U.S.C. § 1623. (A. 3-11). Paragraph 1 of each count alleged that Dunn knowingly made false declarations before a federal grand jury on June 16, 1976. (A. 3-11). Paragraph 4 specified the particular grand jury declarations alleged to be inconsistent. Paragraph 5

of each count alleged that Dunn made certain declarations in a September 30, 1976, proceeding ancillary to *United States* v. *Musgrave*, (hereinafter referred to as the Canges affidavit). The last paragraph of each respective count alleged that the foregoing declarations were inconsistent to the degree that one of them was false. (A. 3-11). Due to the confusion created by the allegations in the indictment, the defendant moved for a bill of particulars to determine whether the government intended to prove that Dunn's grand jury declarations were knowingly false when uttered or whether it was relying on an inconsistent declarations theory under § 1623(c). (A. 12-13). Though the motion was denied, the government indicated its intent to rely on a § 1623(c) theory in proving its case. (A. 17-19). The government responded in part ". . . we do not need to prove at trial which of the declarations is false." (A. 18). Inconsistent declarations was the sole theory presented to the trial court and jury. (A. 65, 66-67).

At trial, Dunn objected to the admission of his grand jury declarations on the grounds that he was protected from their use by the immunity order entered prior to his testimony. (A. 48, 56). He also objected to the admission of the statements given in Canges' office because they were not made in a proceeding before or ancillary to a U.S. Court or grand jury. (A. 55-56, 75).

The government also introduced statements made by Dunn in an evidentiary hearing held October 21,

1976, in U.S. District Court on a motion to dismiss the Musgrave indictment. In it Dunn declared that only about ten percent of his grand jury testimony was true. (A. 43-46). The defense objected to the introduction of these additional statements on the grounds that they were not among the declarations charged in the indictment. (A. 55). The court admitted all three sets of declarations. (Government Exhibits 1-a, 2-a, and 4-a; A. 25, 33, 43, 56-57). [Note: Exhibits 1-a and 2-a are excerpts from the complete transcripts (Exhibits 1 and 2) prepared for presentation to the jury. R. Vol. I, 32, 60].

To support its claim that the immunized grand jury testimony could not be used against Dunn under an inconsistent declarations theory, the defense elicited testimony to demonstrate that Dunn had testified truthfully before the grand jury. The prosecutor handling the grand jury investigation testified that he was aware of independent evidence cooroborating the testimony and, but for Dunn's own recantations, no independent evidence was known refuting it. (A. 51). Assistant U. S. Attorney Snow was asked about each grand jury declaration alleged in the indictment and indicated that he was not aware of any independent evidence establishing its falsity. (A. 51-54).

At the close of the government's case the defendant moved for a judgment of acquittal on the grounds that Dunn's immunized grand jury testimony could not be used to establish the *corpus delicti* of an inconsistent declarations prosecution and that the state-

ments given in the private attorney's office (the Canges affidavit) were not made in proceedings before or ancillary to a U.S. court or grand jury as required by 18 U.S.C. § 1623. (A. 55-56). See Trial Brief (A. 63-67) and Motion for Judgment of Acquittal (A. 59-62). The defense renewed its objections to the introduction of the three exhibits (A. 56-57). The objections were overruled and the motion for judgment of acquittal was denied. (A. 1-2, 5-6).

The trial jury returned verdicts of guilty on three of the five counts. (A. 2). The U.S. Tenth Circuit Court of Appeals affirmed the convictions. (A. 70-80).

The appellate court found that "to state an offense under the statute, the government had to allege inconsistent statements by Dunn made in one or more proceedings ancillary to a grand jury or court." (A. 70). It agreed with Dunn that the Canges statements were not made in ancillary proceedings within the meaning of § 1623. (A. 75). It noted that the indictment pleaded Dunn's grand jury testimony and the Canges statement but completely failed to include his testimony at the Musgrave hearing. (A. 76). The court, however, sustained the conviction finding that Dunn had made inconsistent declarations at the Musgrave hearing, holding it to be an ancillary proceeding. (A. 75). The Court further ruled that Dunn's immunized grand jury testimony could be used to establish the *corpus delicti* in his inconsistent declarations prosecution because Dunn admitted he had lied to the grand jury in the Canges affidavit and in his testimony at the evidentiary hearing. (A. 79). Dunn's Petition for Rehearing was denied on June 22, 1978. (A. 81).

SUMMARY OF ARGUMENT

The Tenth Circuit properly ruled that one of the two alleged inconsistent declarations charged in each count of the indictment was not made in an "ancillary proceeding" within the meaning of 18 U.S.C. § 1623. (A. 75). Therefore, the statute was not violated and the conviction should not have been sustained.

The Tenth Circuit affirmed the conviction by considering declarations made in an ancillary proceeding (i.e. the Musgrave hearing) not charged in the indictment and by adopting a theory not presented at trial. (A. 75-76). The Court's ruling constituted both an amendment to and a prejudicial variance from the indictment. *Stirone* v. *United States*, 361 U.S. 212 (1960).

One of the alleged inconsistent declarations charged in each count of the indictment was taken from grand jury testimony given under a grant of immunity. Immunized testimony cannot be used against the witness in any criminal case unless it can be brought within one of the exceptions to the immunity statute. The grant of immunity is coextensive with the Fifth Amendment privilege. *Kastigar* v. *United States*, 406 U.S. 441 (1972). Several courts have correctly ruled that the statutory immunity and the constitutional privilege prohibit the use of im-

munized testimony to establish the *corpus delicti* of an inconsistent declarations prosecution. *United States* v. *Berardelli*, 565 F.2d 24 (2nd Cir. 1977); *United States* v. *Housand*, 550 F.2d 818 (2nd Cir. 1977) *cert. den.* 431 U.S. 970; *United States* v. *Patrick*, 542 F.2d 381 (7th Cir. 1976) *cert. den.* 430 U.S. 931. A witness cannot be stripped of his immunity under the perjury or false statements exception unless the government proves that the immunized testimony was false.

ARGUMENT I

Since The Canges Declarations Were Held Not To Have Been Made In An Ancillary Proceeding, Dunn's Inconsistent Declarations Conviction Cannot Stand.

The Tenth Circuit Court of Appeals ruled, in part, as follows:

> "This court has concluded that while the Canges statement is 'ancillary', in the sense that it is connected to and had an effect upon the grand jury proceeding, the event occurring in Canges' office, in and of itself, is not a 'proceeding' within the meaning of the statute so as to be a proceeding ancillary to a grand jury proceeding. Despite the administration of the oath and presence of the notary public, we hold that the event lacks the degree of formality the statute requires." (A. 75).

Having so ruled, the appellate court should have found that an essential element to sustain a conviction under § 1623 had not been established and that Dunn's conviction therefore could not stand. Instead, the court looked outside the indictment to the Musgrave evidentiary hearing to fulfill the requirement of an ancillary proceeding. (A. 75).

Title 18, United States Code, Section 1623(a) provides that any person who knowingly makes a false material declaration "in any proceeding before or ancillary to any court or grand jury of the United States" is guilty of a felony. Section 1623(c) states that the falsity of the declaration is sufficiently established if it is proven that the defendant while under oath "made irreconcilably contradictory declarations . . . in any proceeding before or ancillary to any court or grand jury." Having elected to proceed on an inconsistent declarations theory under § 1623(c), the government was obliged to prove that Dunn made irreconcilably inconsistent statements in one or more proceedings before or ancillary to a U.S. court or grand jury. The appellate court itself so stated.[1] (A. 76). Inconsistent declarations made in one ancillary proceeding and one nonancillary proceeding, however, cannot fulfill the jurisdictional requirement when the government proceeds under § 1623(c). The inconsistent statements in the nonancillary proceeding may provide extrinsic evidence of the falsity of the decla-

[1] The Court stated:

> "Therefore, to state an offense under that statute, the government had to allege inconsistent statements by Dunn made in one or more proceedings ancillary to a grand jury or court." (A. 76).

rations in the ancillary proceeding in a traditional perjury prosecution, but will not suffice under a § 1623(c) theory. See e.g., *United States* v. *Housand*, 550 F.2d 818, 823 (2nd Cir. 1977) *cert. den.* 431 U.S. 970; *United States* v. *Davis*, 548 F.2d 840 (9th Cir. 1977).

Assuming, *arguendo*, that Dunn lied in the Canges affidavit, he would not be prosecutable under federal statutes because he did not make his false statments in a proceeding cognizable under 18 U.S.C. §§ 1621 or 1623. Conversely, assuming he lied before the federal grand jury, his inconsistent declarations in the non-ancillary proceeding (i.e. the Canges affidavit) could provide extrinsic evidence to prove the falsity of his declarations before the grand jury [e.g. a § 1623(a) or 1621 prosecution] but could not be used to sustain a conviction under § 1623(c). Otherwise, any inconsistent statement arising out of any situation (e.g. to an F.B.I. agent, in a notarized document, etc.) would relieve the government of the burden of proving falsity under subsection a. The inconsistent declarations must be shown to have been made before a competent tribunal. See *United States* v. *Whimpy*, 531 F.2d 768, 770 (5th Cir. 1976); *United States* v. *Reinecke*, 524 F.2d 435 (D. C. Cir. 1975).

The trial court instructed the jury that two of the essential elements that had to be proved to sustain a conviction under § 1623(c) were as follows:

> "First, the defendant had made two or more declarations which are inconsistent to the degree that one of them is necessarily false. Second, said declarations were given in proceedings before or ancillary to a court or grand jury of the United States." (A. 58).

Since the indictment alleged irreconcilably inconsistent declarations in two separate proceedings, one of which was held not to be an ancillary proceeding within the meaning of the statute, Dunn's conviction under § 1623(c) cannot stand.

ARGUMENT II

The Appellate Court Amended The Indictment In Sustaining The Conviction

The indictment charged that Dunn made inconsistent declarations before the grand jury on June 16, 1976, and in the Canges affidavit on September 30, 1976. (A. 3-11). The only issue presented to the trial court and jury concerned whether Dunn had made irreconcilably inconsistent declarations in those proceedings. The Tenth Circuit in affirming the conviction, however, ruled that Dunn made inconsistent declarations in the June 16, 1976, grand jury proceedings and the October 21, 1976, Musgrave evidentiary hearing. (A. 75). The Musgrave evidentiary hearing was never pled in the indictment. (A. 76).[2]

[2] The appellate court itself noted:

> "In the indictment the government pleaded Dunn's grand jury testimony and Dunn's Canges statement, the latter of which we have determined is in and of itself not taken in a proceeding ancillary to the grand jury. While Dunn's testimony at the Musgrave hearing is clearly taken in a proceeding ancillary to the grand jury the government completely failed to plead such testimony in the indictment." (A. 76).

Furthermore, the Tenth Circuit correctly observed that the government did not attempt to prove the falsity of the grand jury testimony, yet it concluded that Dunn admitted he had in fact testified falsely before the grand jury.[3] (A. 79). The Court's conclusions completely disregarded the testimony in the record which indicated that independent evidence existed which corroborated Dunn's grand jury testimony. (A. 51-54).

The essence of an inconsistent declarations prosecution lies in the proof that the declarations pled are so inconsistent that one of them is necessarily false. 18 U.S.C. § 1623(c). The only declarations pled in the indictment in the present case arose out of the June 16, 1976, grand jury testimony and the September 30, 1976, Canges affidavit. Yet the trial court permitted evidence of Dunn's statements in the October 21, 1976, evidentiary hearing to turn an otherwise non-ancillary proceeding into an ancillary proceeding.[4] The

[3] "In response to Dunn's request for a bill of particulars, the government claimed to rely under § 1623(c). The government and Dunn proceeded upon this theory of the case. For example, Dunn's counsel properly concluded that evidence to show that Dunn's June grand jury testimony was in fact true would be irrelevant in a § 1623(c) prosecution. *** Of course, if the government had not chosen to proceed upon the inconsistent declarations theory, the government would have had to state which statements it intended to prove false, and demonstrate that in fact such specified testimony was true." (A. 74).

[4] "THE COURT: The Court at this time is holding that they are admissible and that those statements, taken in concert, either individually or in concert with the acknowledgment by the defendant before Judge Winner in an adversary proceeding when the defendant was represented by counsel, and he confirmed the falsity of the statements before a court reporter outside of court, supports this Court's view that that channeled its way into being an ancillary proceeding. If not initially, at least it was confirmation when the same confirmation was made before Judge Winner.

MR. SEARS: For the record, I would merely state then that the statements before Judge Winner were not charged in this indictment, and it is an improper extension of this indictment." (R. Vol. II, 108-109).

appellate court also relied upon this extraneous evidence in holding that inconsistent declarations were made in two proceedings before or ancillary to a U. S. Court or grand jury. Each court permitted a variance from and/or amendment to the indictment.

The Fifth Amendment provides that no person shall be held to answer for an infamous crime unless on a presentment or indictment of a grand jury. Once the grand jury has acted, it is improper for the trial or appellate courts to materially change or divert from the allegations in the indictment.

> "If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggest changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the constitution says 'no person shall be held to answer,' may be frittered

away until its value is almost destroyed." *Ex Parte Bain*; 121 U.S. 1, 9-10 (1886).

In *Stirone* v. *United States*, 361 U.S. 212 (1960) this Court found that the trial court improperly allowed the government to introduce evidence of transactions in interstate commerce in a Hobbs Act prosecution which varied from those alleged in the indictment. The Court held that proof at trial of the uncharged acts or transactions amounted to an amendment of the indictment with respect to the element of interstate commerce.

In the present case, the trial and appellate courts looked to proceedings other than those charged in the indictment to find that Dunn made declarations in ancillary proceedings. The trial court bootstrapped a nonancillary proceeding (the Canges affidavit) into an ancillary proceeding and the appellate court fulfilled that necessary element by looking to a proceeding not charged in the indictment.

> "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." *Russell* v. *United States*, 369 U.S. 749, 770 (1962).

The Tenth Circuit acknowledged the deficiency in the government's case when it stated:

> "The government has repeatedly stated its reliance upon § 1623(c) in this case. Therefore, to state an offense under that statute, the government had to allege inconsistent statements by Dunn made in one, or more proceedings ancillary to a grand jury or court. In the indictment the government pleaded Dunn's grand jury testimony and Dunn's Canges statement, the latter of which we have determined is in and of itself not taken not in proceeding ancillary to the grand jury. While Dunn's testimony at the Musgrave hearing is clearly taken in a proceeding ancillary to the grand jury the government completely failed to plead such testimony in the indictment." (A. 76). (Emphasis added).

The appellate court correctly determined that the government had to allege inconsistent declarations in one or more proceedings ancillary to or before a court or grand jury under § 1623(c) but ruled that one of the two proceedings alleged did not qualify. It concluded that the Musgrave hearing did qualify as an ancillary proceeding but was not charged in the indictment. Thus, its ultimate ruling that a fatal variance did not occur by the government's introduction of the Musgrave statements is not consistent with its underlying conclusions.

Departures from the allegations contained in an indictment may take two forms, amendment and variance.

> "An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or Court after the grand jury has last passed upon them. A variance occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment. An amendment is thought to be bad because it deprives the defendant of his right to be tried upon the charge in the indictment as found by the grand jury and hence subjected to its popular scrutiny. A variance is thought to be bad because it may deprive the defendant of notice of the details of the charge against him and protection against reprosecution." (*Gaither* v. *United States*, 413 F.2d 1061, 1071-1072 (D. C. Cir. 1969).

Petitioner contends that he has been the victim of both a variance from and an amendment to the indictment. A variance took place when the trial court permitted introduction of the Musgrave testimony (even though it was not charged in the indictment) and subsequently ruled that the Canges affidavit "channeled its way into being an ancillary proceeding" when Dunn reaffirmed it in the Musgrave hearing. (R. Vol. II, 109). An amendment to and variance from the indictment took place at the appellate level. The Tenth Circuit amended the indictment when it found, on the one hand, that one or more proceedings before or ancillary to a court or grand jury had to be charged under § 1623(c), yet held that the Musgrave

hearing (though not pled) was an ancillary proceeding. The Tenth Circuit also committed a prejudicial variance in looking to the Musgrave testimony in concluding that Dunn had "admitted he lied to the grand jury." (A. 79).

The nature of the offense charged may determine whether a constructive amendment to or variance from the charge has occurred. *United States* v. *Crocker*, 568 F.2d 1049, 1060 (3rd Cir. 1977). When the grand jury has specified the manner in which perjury has been committed, i.e., inconsistent declarations in two particular proceedings, sustaining a conviction on a theory entirely different from that submitted to the jury amounts to a constructive amendment of the indictment. *Id.* The Tenth Circuit found that inconsistent declarations had been made in the Musgrave hearing and before the grand jury; it therefore sustained the conviction on "an entirely different factual basis for falsity" than that considered by the grand jury. *Id.* Neither the reviewing court or the trial court is free to change the charging part of an indictment to suit its own notion of what it ought to have been. *Jeffers* v. *United States*, 392 F.2d 749, 752 (9th Cir. 1968).

ARGUMENT III

Dunn's Immunized Grand Jury Testimony Should Not Have Been Used To Establish The Corpus Delicti Of An Inconsistent Declarations Prosecution

A. Use immunity is coextensive with the Fifth Amendment Privilege.

On June 16, 1976, Robert Dunn appeared before a federal grand jury and claimed his Fifth Amendment privilege against self-incrimination. (R. Vol. I, pp. 1-2; A. 20). The government applied to U. S. District Court to order Dunn to testify notwithstanding his claim of privilege upon the promise that his testimony would not be used against him "in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with order." (A. 24). Dunn contends that the government's failure to bring him within one of the exceptions to the immunity order and its use of his testimony in an inconsistent declarations prosecution violated his Fifth Amendment rights and breached the court's promise of immunity.

The court's order of immunity read as follows:

> "THEREFORE, it is hereby ordered as follows:
>
> 1. That the witness ROBERT DWIGHT DUNN give testimony and provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination

> and that the witness is not excused from testifying or providing other information on the ground that such testimony or information may incriminate him or subject him to penalty or forfeiture;
>
> 2. That no testimony or other information compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness ROBERT DWIGHT DUNN in any criminal case, in any court, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order." (A. 24).

Title 18, United States Code, § 6002, the use immunity statute, contains the same guarantee. As will be argued below, an inconsistent declarations prosecution under § 1623(c) does not fall within the perjury or false statement exception to § 6002.

When Dunn was compelled to testify despite his claimed privilege to remain silent, he was ordered to tell the truth in exchange for a promise that his testimony would not be used against him. It was not shown that he didn't testify truthfully before the grand jury. To the contrary, testimony was elicited to establish that independent evidence existed to corroborate his grand jury testimony. (A. 51-54).

The Tenth Circuit agreed with Dunn that the truth of his grand jury testimony was irrelevant under a § 1623(c) prosecution. (A. 74). Yet it also ruled that the immunized testimony could be used against him

because he admitted that he lied to the grand jury in the Canges affidavit and in the evidentiary hearing. (A. 79). The Court's ruling disregarded the evidence which indicated that he had not lied to the grand jury and adopted a theory of proof never asserted at trial. The theory of prosecution under § 1623(c) did not require the government to show falsity before the grand jury and the government repeatedly declined the opportunity to do so.

It is well established that use immunity is coextensive with the Fifth Amendment privilege. *Kastigar* v. *United States,* 406 U.S. 441 (1972); *United States* v. *Alter,* 482 F.2d 1016 (9th Cir. 1973). "It prohibits the prosecutorial authorities from using the compelled testimony in any respect and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." *Kastigar* at p. 453. When a witness' claim of privilege is set aside under an order of immunity and he is directed to testify against his will, the exclusionary rule leaves the witness in substantially the same position as if he had remained silent. *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 79 (1964). See *United States* v. *Apfelbaum,* 584 F.2d 1264, 1269 (3rd Cir. 1978). Since Dunn was not shown to have given a false statement or to have committed perjury while under immunity, his testimony should not have been used against him.

B. An inconsistent declarations prosecution does not fall within the perjury or false statement exception to the immunity statute.

Title 18, United States Code, § 1623(c) provides, in part:

> "An indictment or information for violation of this section alleging that in any proceeding before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are *inconsistent to the degree that one of them is necessarily false, need not specify which* declaration is false . . . " 84 Stat. 932; Title 18, United States Code, Section 1623(c) (as amended, 1970) (Emphasis added).

Paragraph 4 of each count of the indictment incorporated the declarations Dunn made before the federal grand jury on June 16, 1976. Paragraph 5 reiterated Dunn's declarations in the Canges affidavit of September 30, 1976. (A. 3-10). Paragraph 6 of each count alleged that "the aforesaid declarations by Robert Dunn, as set forth in paragraphs four and five of the Count ____ were inconsistent to the degree that *one of said declarations was false* and known by him to be false when made." (Emphasis added) (A. 4, 5, 7, 9, 11). The government represented prior to and throughout the trial that it had selected an inconsistent declarations method of proof under § 1623(c). (A. 18, 57-58).

Section 1623 provides two methods of proving false declarations before a court or grand jury of the United States. The government may specifically prove that certain declarations were false when made before a court or grand jury or a proceeding ancillary thereto. Alternatively, if two or more declarations were made in one or more such federal proceedings, the government may prove falsity under § 1623(c) if it can show that the declarations were inconsistent to the degree that one of them was necessarily false. The government clearly elected the latter theory. No attempt was made to prove the grand jury testimony false by use of the Canges statement and/or the subsequent testimony in the evidentiary hearing of October 21, 1976. (A. 18, 57-58).

Both the use immunity statute, 18 U.S.C. § 6002, and the false declarations statute, 18 U.S.C. § 1623, were passed by Congress under the Organized Crime Control Act of 1970, Pub. L. No. 91-452 (1970). The use immunity provision guaranteed that testimony compelled under immunity would not be used against the witness in any criminal case "except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 84 Stat. 927, 18 U.S.C. § 6002.

The legislative history is unclear as to how broadly the exception to immunity is to be construed. If, however, the phrase "otherwise failing to comply with the order" is read in conjunction with the preceding language, "perjury" and "false statement", the most

reasonable interpretation is that Congress intended for immunity to be lost by *violating the immunity order* in some way. In particular, instances of violating the order would be by perjury, false statement, or contempt.

If the immunized testimony is truthful, then the immunity order has not been violated and the plain words of the exception are simply not met. As long as the order is complied with, the immunity is binding and the testimony cannot be used against the witness.

An immunized witness can make inconsistent declarations in two separate proceedings without violating his immunity order. If he testified truthfully under immunity but made inconsistent declarations either earlier or subsequent thereto, he cannot have his immunized declarations used against him in a prosecution under § 1623(c). The appellate court in *Housand* recognized the problem and opined that "(i)f the immunized prior testimony was truthful, it may not be used against the witness who, on the second occasion, lies under oath." *United States* v. *Housand*, 550 F.2d 818, 823 (2nd Cir. 1977) *cert. den.* 431 U.S. 970. If, however, the prior immunized testimony is shown to be false, it may "be the predicate for a perjury prosecution. (Citations ommitted)." *Id.* at p. 823. The perjury, however, would have to be proved by extrinsic evidence.[5]

[5] "Even if we assume that a perjury count based merely on the contradiction (18 U.S.C. § 1623(c)) would not stand up, because

The language of the immunity statute refers only to perjury or false statements, not inconsistent declarations. Apparently Congress did not feel it necessary to even include the perjury exception since it has traditionally been known to be an exclusion from the immunity umbrella.

> "The exception for perjury, false statements or other failure to comply with the order is probably unnecessary. See *United States* v. *Monia*, 63 S.Ct. 409, 317 U.S. 424, 87 L.Ed. 376 (1943). It is included out of caution to insure that such immunity is not given. See *United States* v. *Orta*, 253 F.2d 312 (5th Cir.), *cert. den'd.*, 78 S.Ct. 1149, 357 U.S. 905, 2 L.Ed. 2d 1156 (1958)." Organized Crime Control Act, Title IV, U.S. Code Congr. and Admin. News, 91st Cong., 2nd Sess., 1970, p. 4018.

Interestingly, the cases which the legislative history cites concerned species of perjury which predated the passage of the inconsistent declarations statute. It is therefore reasonable to conclude the Congress contemplated an exception no broader than that traditionally known under prior immunity statutes.

> "To interpret this perjury exception to include a prosecution under 1623(c) for inconsistent

the original perjury would not be admissable until it is shown to be false, the giving of truthful testimony on the second occasion could surely trigger investigation of whether the original testimony was false, and whether that could be proved by extrinsic evidence. This is a reasonable cause for apprehension, and supports the claim of privilege." *United States* v. *Housand*, 550 F.2d 818, 823 (2nd Cir. 1977) *cert. den.* 431 U.S. 970.

> statements, some of which were made prior to the latest grant of immunity, would be too broad of a reading of 6002." *United States* v. *Patrick*, 542 F.2d 381 (7th Cir. 1976) *cert. den.* 430 U. S. 931.

Several courts have recently held that immunized testimony may not be used to establish the *corpus delicti* of an inconsistent declarations prosecution. *United States* v. *Berardelli*, 565 F.2d 24 (2nd Cir. 1977); *United States* v. *Housand*, 550 F.2d 818 (2nd Cir. 1977) *cert. den.* 431 U.S. 970; *United States* v. *Patrick*, 542 F.2d 381 (7th Cir. 1976) *cert. den.* 430 U. S. 931.

> "We believe such use was not intended by Congress to come within the exception found in 6002 that the compelled testimony may be used in 'a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.'" *United States* v. *Patrick*, 242 F.2d at p. 385.

The courts have reasoned that a witness cannot be compelled to testify under an order of immunity only to worry about inconsistent declarations that may have been made at another time. *United States* v. *Housand*, 550 F.2d 818 (2nd Cir. 1977) *cert. den.* 431 U.S. 970; *United States* v. *Watkins*, 505 F.2d 545 (7th Cir. 1974); *United States* v. *Alter*, 482 F.2d 1016 (9th Cir. 1973); *United States* v. *Doe* 361 F.Supp. 226 (E.D. Penn. 1973) *aff'd* 485 F.2d 682 (3rd Cir. 1973) *cert. den.* 415 U.S. 989. It is generally agreed that it is

perjury committed in contravention of the immunity order that is excepted for use. *United States* v. *Tramunti*, 500 F.2d 1334, 1342-44 (2nd Cir. 1974) *cert. den.* 419 U.S. 1079; *United States* v. *Patick, supra.*

In *United States* v. *Patrick*, 542 F.2d 381 (7th Cir. 1976) *cert. den.* 430 U.S. 931, it was the government who argued that immunized testimony could not be used against a witness in an inconsistent declarations prosecution. Patrick had testified before a federal grand jury under use immunity three times. As a result, an indictment was returned against a police officer charging failure to report income subject to tax arising out of gambling activities. At trial, Patrick was once again granted immunity and ordered to testify. He continually refused on the grounds that he might subject himself to prosecution for inconsistent declarations under 18 U.S.C. § 1623(c). He claimed use immunity under §§ 6002-6003 did not protect him. Patrick was convicted of criminal contempt under Rule 42(b) of the Federal Rules of Criminal Procedure and sentenced to a term of four years. In Patrick's appeal, the government successfully argued that "Patrick's immunity would extend to protection under § 1623(c) because the use of any immunized testimony to demonstrate Patrick's having made inconsistent declarations would be forbidden by the immunity statute as interpreted in *Kastigar* v. *United States*, 406 U.S. 441, 92 S.Ct. 1643, 32 L.Ed 2d 212 (1972)." *Patrick* at p. 385. The Seventh Circuit agreed in sustaining Patrick's conviction.

The government cannot, on the one hand, continue to ask the courts to compel immunized witnesses to testify by arguing that use immunity protects them against inconsistent declarations prosecutions, but on the other, institute a § 1623(c) prosecution if the witness testifies inconsistently. The government and the courts simply cannot have it both ways. If the government can prove that the witness testified falsely while under immunity, it may prosecute him for perjury under § 1621 or § 1623(a) but cannot rely on an inconsistent declarations prosecution under § 1623(c). "The sanction of the perjury statute adequately protects against a witness making a mockery of immunity." *United States* v. *Apfelbaum*, 584 F.2d 1264, 1270 (3rd Cir. 1978).

Use immunity cannot be entered on behalf of a witness unless the government specifically applies for it. 18 U.S.C. § 6003. When the government applies to U. S. District Court for immunity, it represents to the court and the witness that it won't use the compelled testimony aginst the witness in exchange for the information received. It, of course, expects the information to be truthful. If, however, it turns out to be false, the government must be compelled to prove it false before it can breach its promise to the witness.The government's remedy is a perjury prosecution under § 1621 or a false declarations prosecution under § 1623(a).

The inconsistent declarations method of proof under § 1623(c) relieves the government of the burden of

proving falsity. If the government is unable or *unwilling* to prove that the immunized witness breached his promise by testifying falsely, it cannot be permitted to ignore its end of the bargain by using the immunized testimony against the witness. Petitioner submits that this court can reconcile 18 U.S.C. § 1623(c) with the use immunity statute and the Fifth Amendment only by holding that immunized testimony cannot be used to establish the *corpus delicti* in inconsistent declarations prosecutions.

CONCLUSION

For the reasons stated, petitioner respectfully requests this Honorable Court to reverse the judgment of the Court of Appeals and remand the case with instructions to enter a judgment of acquittal on his behalf.

Respectfully submitted,

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